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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE NATIONAL TREASURY EMPLOYEES UNION

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QUESTIONS PRESENTED

I. Did the court below err in concluding that the budget reduction mechanism in the Balanced Budget and Emergency Deficit Control Act of 1985 was not an unconstitutional delegation of legislative power where:

a) the Act gives unelected officials with the unprecedented power to undo duly enacted appropriations law and to make spending reductions automatically, without congressional approval;

b) the Act was designed to avoid congressional accountability by allowing the federal budget to be balanced in a way that insulated members of Congress from having to vote on specific budget cuts or tax increases;

c) the Act provides no meaningful guidance to its administrators in making required budget deficit forecasts which ultimately determine the spending levels of the entire federal budget; and

d) the Act precludes judicial review of the administrators' pivotal deficit forecasts.

II. Did the court below correctly hold that the Act violates separation of powers principles in assigning a significant executive role to the Comptroller General, an official who is removable by and otherwise answerable only to Congress?

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BRIEF FOR APPELLEE NATIONAL TREASURY EMPLOYEES UNION

STATEMENT OF THE CASE

At issue in this appeal is the constitutionality of the automatic spending reduction mechanism created by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, commonly known as the Gramm-Rudman Act. Under the Act, the Comptroller General, with the help of the Office of Management and Budget (OMB), and the Congressional Budget Office (CBO), is charged with predicting the magnitude of the budget deficit for the coming fiscal year. A prediction that the deficit will exceed the statutory target automatically triggers reductions in spending levels previously set by duly-enacted legislation.

1. The Gramm-Rudman Act

a. The legislative history of the Gramm-Rudman Act [1] unequivocally reveals that Congress created the automatic spending reduction mechanism because it wanted to reduce the size of the federal budget deficit, but found no consensus to do so under the ordinary budget process.[2] The legislative debates show that Congress was not able to reduce the deficit under the ordinary process because, collectively and individually, its Members would not openly endorse the requisite spending cuts, or tax in-

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[1] The Gramm-Rudman bill, S.1702, was an amendment to H.J. Res. 372, a bill to increase the ceiling on the national debt. There were no Senate hearings, committee mark-ups or reports on the bill. After H.J. Res. 372 passed the Senate, it went to conference. While the bill was in conference, there were hearings on Gramm-Rudman in the House. *See Hearings on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Gov't. Operations*, 99th Cong., 1st Sess. (1985) (*"House Hearings"*).

[2] *See, e.g.*, 131 Cong. Rec. S12082 (Sept. 25, 1985) (remarks of Sen. Gramm); 131 Cong. Rec. S12085 (Sept. 25, 1985) (remarks of Sen. Rudman). All references to volume 131 of the Congressional Record are to the daily edition.

creases, for fear of losing the support of any elements of their constituency.[3] As a consequence, while recognizing that the deficit must be reduced, Congress had not been able to agree on the choices necessary to accomplish that result.

Gramm-Rudman was designed as a politically palatable means of balancing the budget. Some Congressmen who supported its passage felt that the spectre of automatic cuts under the Act would compel Congress and the President to make the hard choices they had theretofore shunned.[4] But none would quarrel with the notion that Congress enacted Gramm-Rudman in order to assure that the budget deficit would be reduced, whether or not its Members continued to decline openly to choose between competing interests. Generally, Gramm-Rudman achieves this result by establishing a maximum allowable deficit amount for each fiscal year between 1986 and 1991, and by creating an administrative mechanism to implement those targets automatically, regardless of what spending levels are set by enacted legislation, unless the legislation meets the target. We turn now to a more detailed consideration of the role of this new administrative mechanism in the overall budgetary process.

b. Gramm-Rudman directs the President to submit in January of each year a budget that does not exceed the target deficit for the upcoming fiscal year, which begins the following October. Congressional Budget and Impoundment Act of 1974, 31 U.S.C. 1105(f), as amended by Section 241(b). In order to measure anticipated revenues against anticipated expenditures, and predict the deficit so as to meet the target, the President must, in January, predict the conditions of the economy for the next 21 months through the end of the coming fiscal year. Unpredicted changes in domestic and international

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[3] *See, e.g.*, 131 Cong. Rec. H11887 (Dec. 11, 1985) (remarks of Rep. Jones).

[4] *See, e.g.*, 131 Cong. Rec. S17389 (Dec. 11, 1985) (remarks of Sen. Gramm).

economic conditions during that period will affect, sometimes dramatically, revenues collected, expenditures made, and hence the size of the deficit. The Act contemplates that Congressional action on all appropriations be completed in June.[5]

Although political pressure to fund all programs continues under Gramm-Rudman, the difference is that the individual appropriations measures passed by Congress and signed by the President may be drastically altered to meet the target deficit by administrative action automatically implemented without further congressional or Presidential consideration. Thus, on August 20 each year, the CBO and OMB must issue a report in which they predict what the deficit will be in the next fiscal year, considering all legislation enacted by August 15, the condition of the economy, and their forecast of economic conditions in the upcoming fiscal year. Sections 251(a)(1) and (a)(2); J.A. 109-110. If they predict that the target deficit will be exceeded by 10 billion dollars or more, they must specify in accordance with the Act's requirements which programs must be cut, and to what degree. Sections 251(a)(2) and (a)(3); J.A. 110-114. Because they must issue a single report, the Directors are instructed to "average their differences to the extent necessary to produce a single, consistent set of data that achieves the required deficit reduction." Section 251(a)(5); J.A. 115.

Within five days after the OMB/CBO report is issued, on August 25, the Comptroller General must review it and issue his own report. Section 251(b); J.A. 116-118. The Comptroller General's deficit prediction, based on his economic forecast, determines whether and to what extent

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[5] The Act's timetable contemplates completion of the non-binding concurrent resolution, meeting target deficits by April 15, reconciliation legislation by June 15, and House action on all annual appropriations by June 30. Section 201(b), amending Sections 300 and 301(a) and (i) of the Budget Act. Joint Appendix ("J.A.") at 106-108.

cuts must be made in existing spending levels.[6] Significantly, the economic data, assumptions, and methodology used by the Comptroller General to determine the projected deficit are not subject to judicial review. Section 274(h); J.A. 166.

By September 1, the President must issue a "sequestration" order, carrying out, without change, the cuts specified by the Comptroller General. Section 252(a)(1),(a)(3); J.A. 124-125, 128. This order takes effect unless within one month, by October 1, Congress and the President enact alternative reductions that would result in meeting the target deficit. The Act provides for a second round of reporting by OMB and CBO on October 5, and by the Comptroller General on October 10, to account for changes since August 25. Section 251(c); J.A. 118-119. In accordance with those reports, on October 15, the President issues a final sequestration order, effective immediately. Section 252(b); J.A. 132-134.[7]

c. Congress recognized that the automatic reduction mechanism raised serious constitutional questions concerning the separation of powers. Therefore, it provided for expedited judicial review of the Act's constitutionality as well as a fallback provision, should the automatic mechanism be declared invalid for any reason. Sections 274

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[6] The Act requires equal reductions between defense and nondefense programs. Section 251(a)(3)(B); J.A. 110-111. To do this, it first eliminates all automatic cost of living adjustments mandated by Statute, or reduces them to the point where one half the excess deficit, as forecast by the Comptroller General, is eliminated. Section 251(a)(3)(C); J.A. 111. Then the remaining parts of the budget (except for those parts exempted), are to be reduced by a uniform percentage until the target is met. Section 251(a)(3)(F); J.A. 112-114.

[7] The foregoing discussion was based on the deadlines and process the Act imposes for fiscal years 1987 to 1991. The process used for 1986 was the same in principle, with some adjustments to account for the fact that the Act was not signed into law until two months into the fiscal year. The 1986 provision of primary relevance to this case froze cost-of-living adjustments due federal retirees on January 1, 1986. Section 252(a)(6)(C); J.A. 129-130.

(a)-(c), (f); J.A. 162-166. Under the fallback provision, the Comptroller General is eliminated from the deficit reduction process, and the report of OMB and CBO goes instead to a joint budget committee of Congress. The budget committee reports its contents to both Houses which then consider the matter on an expedited basis. The cuts specified in the report will go into effect, like any other legislation, only if both Houses and the President concur (or if the President's veto is overridden). Section 274(f); J.A. 165-166.

2. Proceedings Below

a. The 9,000 retiree/members of the National Treasury Employees Union ("NTEU" or "the Union") were among the first persons injured by the Act, alleging that the automatic trigger is unconstitutional, and that the cost-of-living adjustment frozen on Jan. 1, 1986, should be fully restored. NTEU filed suit on December 31, 1985, to challenge the constitutionality of the automatic reduction mechanism. J.A. 13-15. Its suit was consolidated with an action filed by Representative Mike Synar and eleven other Congressmen. The Senate, the House Bipartisan Leadership Group, and the Comptroller General intervened in defense of the statute.

In the court below, the United States (the nominal defendant) unsuccessfully challenged the Congressmen's standing to maintain the suit. J.A. 30-31, 36-38. All parties agreed, however, and the Court ruled, that NTEU had standing to assert the rights of its retiree/members, whose cost of living adjustments for 1986 were eliminated. *Id.* at 31, 34-36.

b. In the court below, plaintiffs argued that the Act's automatic spending reduction mechanism violates the Constitutional provision vesting all legislative power in Congress. NTEU explained that in this Act, Congress and the President have abdicated their constitutional duty to legislate the nation's spending priorities, and that the Act impermissibly and in unprecedented fashion delegates legislative authority to various unelected administrative officials, whose decisions and methods are ex-

plicitly insulated from judicial review. Further, plaintiffs contended that, to the extent Congress could delegate any authority here, it may not delegate it to the CBO, a congressional agency, or the Comptroller General, an official who is removable by Congress.

c. The district court ruled that the automatic spending reduction mechanism violates the separation of powers doctrine on the second ground plaintiffs advanced. J.A. 55-80. The court rejected plaintiffs' arguments that the enormous and unguided authority the Act gives to OMB, CBO, and the Comptroller General to alter existing legislation, on the basis of unguided and unreviewable determinations and methodologies, violates the constitutional provision that vests all legislative power in Congress. *Id.* at 38-55.

However, the court ruled that the role of the Comptroller General in the spending reduction mechanism violated separation of powers principles. The court concluded that the powers the Act confers upon the Comptroller General are executive in nature and that the Comptroller General cannot, consistent with the separation of powers doctrine, exercise such executive powers because he is removable by and thus beholden to Congress. *Id.* at 71-78.

Relying on precedents of this Court, the district court rejected the intervenors' contentions that the constitutionality of the Comptroller General's role in the automatic reduction process was not ripe for review, holding that Congress' removal power creates a "here-and-now subservience" of the Comptroller General to Congress. J.A. 57. The court also rejected intervenors' suggestion that if the powers granted to the Comptroller General under the Act cannot be assigned to an officer removable by Congress, then the 1921 statute that makes him so removable, not the 1985 grant of powers, should be stricken. J.A. 59-61.

Thus, the district court declared the automatic deficit reduction mechanism unconstitutional, and the Presiden-

tial sequestration order issued February 1, 1986, without legal force and effect.

SUMMARY OF ARGUMENT

1. The automatic deficit reduction mechanism is an overbroad delegation of legislative power to the Act's administrators. The automatic mechanism cannot be constitutionally sanctioned for several reasons. First, that mechanism would directly undermine a central principle of the delegation doctrine: that fundamental policy decisions, such as those required to establish a balanced federal budget, are to be made by accountable elected officials. In violation of this principle, the Act transfers to its unelected administrators the responsibility for determining whether spending levels in duly considered appropriations laws will be reduced, and to what extent, and it allows these administrative determinations to take effect automatically. As the legislative debates reveal, Congress devised the automatic reduction scheme not for reasons of governmental necessity but for reasons of political expediency. The automatic mechanism permits attainment of a balanced budget but in a way that insulates members of Congress from making the hard—and unpopular—choices which are needed to reach that goal.

Second, the key principle of accountability is further undercut because, in making its unprecedented, wide-ranging delegation of power to the Act's administrators, Congress provided no meaningful standards to guide them in the making of pivotal budget deficit estimates. Such deficit estimates are highly speculative and yet they ultimately decide whether, and in what amounts, spending must be cut to meet the Act's deficit targets. Finally, the uncontained nature of the delegation made by the Act is further underscored by its total preclusion of judicial review of the crucial deficit projections that trigger the automatic reduction mechanism.

2. The Act is administered by the Comptroller General, in coordination with the Congressional Budget Office and the Office of Management and Budget. Because

the Comptroller General may be removed by and is beholden to Congress, he may not constitutionally exercise the executive power assigned to him by the Act. The congressional power to remove the Comptroller General, coupled with the lack of any counterbalancing power on the part of the President, ensures the Comptroller General's fealty to Congress. The legislature thus retains an influence over administration of the Act that violates separation of powers principles. The court below correctly discerned that "here and now subservience" to Congress is guaranteed by the potent power of removal.

Finally, this Court should decline appellants' invitation to strike this removal provision if it concludes that the powers assigned by the Act to the Comptroller General cannot be conferred upon an officer removable by Congress. On the basis of this Court's precedents, the district court correctly determined that the path of eliminating the removal provision was not open to it. The court also rightly concluded that, even if it had such an option, it should be rejected given the Act's legislative history, its inclusion of a specific fallback deficit reduction provision, and the uncertain consequences of striking the removal provision upon the Comptroller General's duties under other statutes.

ARGUMENT

THE ACT'S AUTOMATIC DEFICIT REDUCTION PROCESS IS UNCONSTITUTIONAL.

INTRODUCTION

The Union contends that the Act's automatic spending reduction provisions are constitutionally defective because they mark an overbroad delegation of legislative power. This case presents the fundamental question of whether Congress can constitutionally create a statutory mechanism that transfers to unelected administrators the power to determine federal budget reductions where: (1) the magnitude of those reductions is based on the administrators' economic forecasts, the making of which is unguided by any meaningful standards; and (2) the re-

ductions override duly enacted appropriations and occur automatically without approval by any elected officials.

We urge that such a mechanism is constitutionally impermissible because the Act, at bottom, represents a congressional effort to avoid making the hard choices that all acknowledge must be made in order to meet the declared objective of balancing the federal budget. Congress, in this Act, sought to insulate itself from having to specify the requisite, but politically unpopular, spending determinations, and instead assigned the task of deciding whether spending reductions would take place, and in what amounts, to the Act's administrators. Under the Act's scheme, the administrators' determinations can take effect automatically without any Presidential review or affirming congressional action. We believe that this scheme cannot stand because it frustrates—by design—the primary purpose of the delegation doctrine: to assure that fundamental policy decisions, such as the setting of spending levels for the federal government, will be made by accountable, elected representatives.

We alternatively maintain that, assuming Congress may delegate budget-cutting responsibilities, the way it has chosen to do so is constitutionally defective. The district court correctly concluded that the Act's assignment of administrative responsibilities to the Comptroller General, an official removable by and thus beholden to Congress, violates well established principles of separation of powers.

I. THE AUTOMATIC DEFICIT REDUCTION PROCESS CONSTITUTES AN UNCONSTITUTIONAL DELEGATION OF CONGRESS' RESPONSIBILITY TO SET SPENDING LEVELS.

A. The Governing Principles of the Delegation Doctrine Underscore that Fundamental Policy Choices, Such as Those Required to Establish the Contours of Federal Spending, Must Be Made by Congress and Not by Unelected Officials.

As the district court observed, the delegation doctrine derives from the principle of separation of powers that

underlies our three-branch system of government. J.A. 39. This Court has instructed that this principle is breached where "Congress gives up its legislative power and transfers it . . ." to the executive branch. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). More recently, the Court has reaffirmed that separation of powers "was not simply an abstract generalization in the minds of the Framers" (*INS* v. *Chadha*, 462 U.S. 919, 946 (1983), *quoting Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976)), but a vital restraint designed to ensure that "the carefully defined limits on the power of each Branch must not be eroded." *INS* v. *Chadha*, 462 U.S. at 958.

We believe that, in this Act, Congress unquestionably overstepped its authority and breached the separation of powers principle. As we show, the Act confers on its administrators "such a breadth of authorized action" that it ultimately surrenders to them "the functions of a Legislature . . ." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 418 (1935). The abdication of legislative power found in the Act cannot be squared with "the profound conviction of the framers that the powers conferred on Congress were the powers to be most carefully circumscribed." *INS* v. *Chadha*, 462 U.S. at 947.

Article I of the Constitution vests "[a]ll legislative powers . . . in a Congress . . . which shall consist of a Senate and House of Representatives" and declares that Congress is "[t]o *make all laws* which shall be necessary and proper." U.S. Constitution art. I, sections 1, 8 (emphasis added). In addition, and of particular relevance for this case, Article I stipulates that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." *Id.*, sec. 9, cl. 7. This Court long ago recognized that Article I imposes a limit on Congress' ability to delegate its law-making power to the other branches of government: "That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by

the constitution." *Field* v. *Clark*, 143 U.S. 649, 692 (1892). Implicit in this limiting principle was a recognition that unchecked transfers of legislative power would insulate the legislature from accountability to the electorate and thus thwart the Constitution's design that laws are to be democratically considered in accord with a "finely wrought and exhaustively considered, procedure." *INS* v. *Chadha*, 462 U.S. at 951.

While the admonition against undue delegation has been frequently iterated, the principle has seldom been held to be breached. As the district court observed, there are only two cases, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, *supra*, in which the Court declared statutes unconstitutional because of overbroad delegations.

It is clear, however, that while no statute has lately been voided because of delegation defects, the principles of the doctrine continue to be instrumental. *See, e.g.*, *National Cable Television Association* v. *United States*, 415 U.S. 336 (1974), and *Kent* v. *Dulles*, 357 U.S. 116 (1958) (where the Court invoked the delegation doctrine to read a statute narrowly and thus avoid the constitutional question).

Although the Court has taken various approaches in saving numerous statutes from challenges of excessive delegation, no simple test for overbroad delegation has emerged.

The salient considerations underlying the delegation doctrine were perhaps most aptly stated by Justice Harlan in an often-cited dissenting opinion in *Arizona* v. *California*, 373 U.S. 546 (1963). Justice Harlan explained that the doctrine serves two primary functions, of especial relevance here, which are essential to the Constitution's separation of powers scheme:

> *First*, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to

> the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Id. at 626. When viewed against the backdrop of the doctrine's animating principle of accountability, this Court's decisions provide a useful focus, and reveal why this Act exceeds the limit of lawful delegation.

First, and most fundamental, is the requirement that Congress genuinely exercise the "essentials of the legislative function" by making the basic policy decisions and formulating a rule of conduct to effectuate its policy devices. *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). Embodied in this factor is the overarching principle that the "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate . . ." *United States* v. *Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring). The inquiry mandated is aimed at ensuring that Congress make the so-called hard choices; it instructs that Congress' "policy-making function" is not to be passed on to those not "answerable or responsive in the same degree to the people." *Ibid.*

Second, and consonant with the doctrine's objective of ensuring accountability, is the requirement that the statute provide sufficient standards to guide the exercise of delegated power. The statute must provide an "intelligible principle" which can be discerned and followed by the delegate. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. at 409. While obviously connected to the ultimate question of whether Congress has sufficiently exercised its legislative power, the "sufficient standards" requirement shifts the focus to whether Congress has provided enough policy guidance to administrators that its will can be followed. *Yakus*, 321 U.S. at 424-425.

Third, the Court must assess the role of so-called governmental necessity. The Court has recognized the "necessity" for increasingly broad congressional delegation, under the rationale that certain decisions may be delegated to administrators because they are just too tech-

nical, complicated, or detailed, or they require expertise not possessed by Members of Congress. *See Buttfield* v. *Stranahan*, 192 U.S. 470, 496 (1904).

Lastly, and particularly in cases involving broad delegations, the courts have been sensitive to the availability of judicial review as a check on the granting of uncontrolled discretion to delegates. *See e.g., Yakus*, 321 U.S. at 425, *Amalgamated Meat Cutters* v. *Connally*, 337 F.Supp. 737, 755, 757, 759 (D.D.C. 1971) (three-judge court).

Obviously, the factors described do not themselves provide one coherent theory for analyzing delegation problems. To be useful as yardsticks, they must not be viewed in isolation, as we believe the district court did, nor do they necessarily deserve equal weight. They must be examined as a whole and always in connection with the fundamental purpose of the delegation doctrine: the preservation of political accountability in our representative form of government.[8]

In the Act, Congress and the President, motivated by the wish both to balance the budget and to avoid being identified as the cause of the resulting pain, created a device that does both, the "automatic" trigger. The infirmity of the law is that it places in the hands of unelected officials the power to decide whether reductions in duly enacted appropriations laws will be made at all and how deep those reductions must be, and it makes the de-

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[8] Regarding the delegation doctrine's objective of ensuring accountability in governmental decisionmaking, see *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *McGautha* v. *California*, 402 U.S. 183, 272 (1971) (Brennan, J., dissenting); *United States* v. *Robel*, 389 U.S. 258, 276 (1976) (Brennan, J., concurring); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 735, 746 (D.D.C. 1971) (three-judge court).

The commentators, too, have stressed accountability concerns in examining the delegation doctrine's rationale. *See, e.g.*, Wright, *Book Review*, 81 Yale L.J. 575, 582-587 (1972) (reviewing K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969)); J. Ely, *Democracy and Distrust* (1980) at 131-134.

cisions of those officials effective automatically. This enormous power is, in vital respects, unguided by the legislature and unchecked by anyone, including the judiciary. The result is that new, substitute laws are being made and effected outside the lawmaking framework established by the Constitution. As we shall show, while other statutes similar in some respects to the Act have survived delegation challenges, none had the cumulative infirmities found in the Act, which lead—indeed by design—to the utter frustration of the accountability objective that lies at the heart of the delegation doctrine.[9]

B. The Statute's Automatic Deficit Reduction Mechanism Frustrates the Delegation Doctrine's Central Purpose of Ensuring that Elected Legislators Be Accountable for the Fundamental Policy Determinations Concerning the Setting of Federal Spending Levels.

1. *The Automatic Mechanism Represents an Incomplete Exercise of the "Essentials of the Legislative Function."*

In the Gramm-Rudman Act, Congress failed to perform the "essentials of the legislative function." *Yakus*, 321 U.S. at 424. The Constitution demands that Congress itself make the "hard choices" that lie at the core of policy embodied in law. Examination of the circumstances surrounding the passage of the Act reveals a clear congressional purpose to avoid those hard choices and instead to transfer essential lawmaking responsibilities to the Act's administrators.

It has been widely accepted that the deficit is dangerously high and must be reduced. Virtually all who spoke in the Gramm-Rudman debate prefaced their remarks with protestations of absolute commitment to reducing

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[9] With the device of the legislative veto no longer available, Justice White predicted in dissent in *INS* v. *Chadha*, 492 U.S. at 968, Congress will be tempted "to abdicate its law-making function . . . ," resulting in "unaccountable policymaking by those not elected to fill that role." In our view, in passing the Gramm-Rudman Act, Congress has succumbed to the temptation to abdicate.

the deficit. It was also clearly understood what the limited options are for reaching that goal: significant defense reductions, significant reductions in non-defense programs, cuts in "entitlement" programs, tax increases, or some combination of these. *See, e.g.*, remarks of Sen. Nunn, 131 Cong. Rec. S17425-26 (Dec. 11, 1985). Everyone also understood that these truly difficult choices have not been made in the Act itself.

In fact, the congressional debates make quite clear that Congress intended to avoid those basic choices that are the essence of policymaking, because it wished to avoid accountability for such unpopular choices. It intended that the budget be balanced through the automatic mechanism without ever requiring Congress to vote on specific spending reductions or tax increases.[10]

We discuss *infra* at 21-24 the ways unelected officials exercise unfettered discretion under the Act. We show first, that Congress wished to and did avoid making essential policy choices; second, that the power ceded was a legislative power; and, finally, that the Act assures that Congress can continue to avoid being held politically accountable and that the result is abject failure to perform the essentials of the legislative function.

a. That Gramm-Rudman itself does not confront the hard decisions required to control the budget deficit was recognized by key supporters of the Act during the legislative debates. As Senator Dodd observed, "[t]he easiest

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[10] We recognize, of course, that in passing a statute as complex as Gramm-Rudman, it cannot fairly be said that Congress made no policy choices. For example, it decided that certain federal programs were to be exempt from budget reductions and it determined that the automatic cuts were to be divided evenly between defense and non-defense programs. But clearly it does not follow that because Congress made *some* policy decisions, it therefore fulfilled its legislative responsibilities. One cannot ignore what Congress chose *not* to do: namely, to choose among the known alternatives for reducing the budget, and to decide whether cuts would be made at all in a given year, and what the depth of those cuts would be.

vote we will cast . . ." is the one in favor of the Act. 131 Cong. Rec. S17427 (Dec. 11, 1985). Indeed, Senator Gramm, a co-author of the Act, acknowledged that the hard choices of budget balancing were yet to be made when he said that the automatic mechanism was intended as a "disciplining agent" which would only take effect "if we fail to do our job." *Id.* at S17389 (Dec. 11, 1985). He had earlier explained that the point of the mechanism was to "make Congress make hard decisions . . ." *Id.* at S12962 (Oct. 9, 1985).

But, in addition to showing that the Act fell short of grappling with the difficult choices of budget policy, the legislative debates underscored Congress' unabashed wish to avoid political accountability for those choices through the shield of the automatic mechanism, a scheme that was strongly criticized by the Act's opponents. Senator Mathias urged that the Act embodied a process that

> . . . is mechanical, it is preset: it is mindless, and no one need accept blame. This [Act] searches for a way to evade the hard choices that deficit reduction demands. It strives for a way to reach the goal without taking responsibility. It represents budget balancing by anonymous consent.

Id. at S14919 (Nov. 6, 1985).

Representative Gray similarly stated that the Act "encourages Congress to avoid hard decisions, secure in the knowledge that a sequestration of funds is to come that will do it instead." *Id.* at H11889 (Dec. 11, 1985). Rep. Hartnett declared that "if Webster's could define Gramm/Rudman it would be something like this: an abdication of congressional responsibility, a loophole through which Congressman can slide." (*sic*) *Id.* at H11889 (Dec. 11, 1985). Finally, Rep. Waxman lamented that, in adopting the Act, Congress had established Government "by automatic pilot . . . And when the ax falls and when our constituents come to us . . . the answer from the President and the Congress will be, I'm sorry, I am not responsible. Your misery is caused by a budget process that is beyond

our control. It is out of our hands." *Id.* at H11881 (Dec. 11, 1985).[11] Finally, Senator Kennedy, a supporter of Gramm-Rudman, recognized that the Act reflected Congress' inability to meet its responsibilities when he observed that making automatic "across-the-board cuts" was the only real avenue to achieve a balanced budget because "Congress itself seems to lack any will or strategy to limit and then eliminate the deficit under present procedures." *Id.* at S12961 (Oct. 9, 1985).

Hence, what the legislative debates starkly disclose is an "obvious example of Congress simply avoiding a choice which was both fundamental . . . and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). But, as we have maintained, it is precisely these fundamental budget choices that our Constitution requires be made by accountable, elected officials under our republican form of government. When such choices are to be made "the buck stops with Congress and the President, insofar as he exercises his constitutional role in the legislative process." *Id.* What this Act provides should Congress itself fail to legislate to meet its deficit targets is a mechanism for the surrender of policy making authority through the automatic reduction process.[12] In the absence of congressional confrontation of the necessary choices of budget-balancing, the Act creates a policy vacuum which is permitted to be filled by the "unthinking, bloodless" determinations of the automatic mechanism.[13]

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[11] *See also*, remarks of Reps. Conte, Garcia, Rodino, Hyde and Levine at 131 Cong. Rec. H11885-11890 (Dec. 11, 1985).

[12] As Judge Wright has observed: "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." Wright, *Book Review, supra*, 81 Yale L.J. at 585.

[13] 131 Cong. Rec. H11885 (Dec. 11, 1985) (remarks of Rep. Hyde).

b. When the automatic trigger operates, as it did in the current fiscal year, an administrative spending reduction process, substituting for previously enacted laws, automatically takes effect. That this mechanism represents a surrender of the "essentials of the legislative function" is demonstrated by this Court's analysis in *INS* v. *Chadha*, where this Court defined power of a "legislative character." 462 U.S. at 952. In *Chadha*, the Court determined that the legislative veto device must be struck down because it represented the exercise of legislative power without adherence to Article I's lawmaking requirements. Crucial to the Court's determination that the veto was essentially legislative in nature was the fact that the veto "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch". *Ibid.* In addition, the veto's "legislative character" was "confirmed by the character of the Congressional action it supplants." *Ibid.*

By these standards, the administrative determinations that result in budget reductions under the automatic mechanism are legislative actions. When the automatic mechanism comes into play, previously enacted appropriations statutes are nullified and supplanted by the determinations of administrators. In effect, the Act authorizes the President, through his issuance of a sequestration order, to undo duly enacted statutes with something that is less than a law.[14] When it takes effect, that order, as a practical matter, constitutes automatic substitute legislation which directly alters the legal rights and obligations of persons just as a duly passed appropriations law would. In sum, by giving away, in its most basic sense, fundamental lawmaking power, Congress has failed to exercise for itself the essentials of the legislative function.

c. As seen, many legislators agreed with our view that this Act is an unprecedented abdication of Congressional

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[14] *See* letter of Rep. Rodino, quoted in 131 Cong. Rec. H9607 (Nov. 1, 1985).

authority.[15] Supporters countered that this bill would bring "discipline" to the budget problem because the spectre of draconian cuts under the automatic trigger would force Congress and the President to make the "hard decisions." *See, e.g.*, remarks of Sen. Gramm, *id.* at S12962 (Oct. 9, 1985) and S17389 (Dec. 11, 1985).[16]

If Congress had simply reserved the necessary budget choices for another day, no delegation would occur and no constitutional issue arise. But the heart and sole reason for this Act is its automatic trigger device. The Act is completely predicated on the trigger being pulled and accomplishing the desired goals, as it has been pulled in the current fiscal year. As Senator Heinz aptly put it, the device is Congress' way of saying, "[s]top me before I kill again." 131 Cong. Rec. S12973 (Oct. 9, 1985).

Moreover, although many of the Act's supporters depicted the automatic trigger mechanism as a "club" that would force Congress to do its job, there was also a clear recognition that instead of acting as a "disciplinary agent," the trigger could prevent responsible budget cutting. As a colloquy among Senators Stevens, Packwood, and Domenici (the latter two key supporters of the bill) illustrates, a concern existed that the automatic trigger would actually be a disincentive for Members to make the hard budget choices.

Senators Stevens' questions focused on the problem of the so-called "double hit" that would befall those legislative committees which struggle during the appropriations process responsibly to reduce program spending. He pointed to the hypothetical situation of a defense appropriations committee deciding to decrease its spending

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[15] *See, e.g.*, remarks of Rep. Levine, 131 Cong. Rec. H11890 (Dec. 11, 1985), remarks of Rep. Rodino, *id.* at H9607 (Nov. 1, 1985), and remarks of Sens. Hatfield, Bumpers, Hart, DeConcini, Lautenberg, and Byrd, *id.* at S12966 (Oct. 9, 1985), S13107, S13092, S13108 (Oct. 10, 1985), S14917 (Nov. 6, 1985), S17441 (Dec. 11, 1985), respectively.

[16] *See also, e.g.*, remarks of Sens. Hollings, *id.* at S17390 (Dec. 11, 1985), and Packwood, *id.* at S17430 (Dec. 11, 1985).

authorization by a significant amount, only to be hit with yet additional cuts if the fixed percentage reductions of the automatic mechanism were triggered. As he explained, if the committee successfully insisted that the Congress fund its programs to the maximum and then had to endure the automatic cuts, its programs would clearly fare better than if it had to absorb the double hit. 131 Cong. Rec. S17429 (Dec. 11, 1985).

Senator Packwood, a staunch supporter of the Act, admitted that Senator Stevens had "put his finger on a genuine problem . . . to which I do not have an answer, except we are all in the same boat together." *Id.* at S17430. Senator Domenici offered that it was unlikely that any programs would have to absorb disproportionate double hits because committees would refuse to make cuts unless they saw others doing the same. *Id.* at S17431. Senator Stevens replied that Senator Domenici "just answered my question. That is what I was afraid would happen. People will sit around and do nothing." *Ibid.*

The significance of the colloquy is obvious: rather than acting as a "club," the automatic mechanism is likely to have the opposite effect. And when the automatic mechanism does take effect, as it already has once, it will mean, as even Senator Gramm candidly acknowledged, that Congress failed again to fulfill its legislative responsibilities. *Id.* at S17389 (Dec. 11, 1985).

Finally, it should be noted that, even if this Act were magically to provide the "backbone transplant" to Congress that sponsoring Senator Rudman hoped for,[17] the Act is structured so as to make it virtually impossible to complete a responsible budget package. Any party necessary to a compromise that believes its interests would be better served by automatic sequestering can refuse to agree, and thereby guarantee that sequester will take place.[18] For example, if the Congress decides that a tax

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[17] 131 Cong. Rec. S12962 (Oct. 9, 1985).

[18] Remarks of Sens. Gore, 131 Cong. Rec. S12900 (Oct. 8, 1985); Riegle, *id.* at S17410 (Dec. 11, 1985); Lautenberg, *id.* at S17435 (Dec. 11, 1985).

increase is necessary to reach the deficit target, but the President disagrees and views automatic sequester as preferable, he need only veto the tax increase. Automatic reductions would then occur in contravention of the majority will in Congress.

In sum, Congress and the President expected that the automatic mechanism would in fact function and relieve them of responsibility; indeed, the device provides strong disincentive to reaching any agreement on the necessary legislative choices, and implements the decisions of non-legislators when agreement cannot be reached.

2. *The Act Provides Insufficient Standards to Guide the Administrators in the Making of the Critical Budget Deficit Projections Which Ultimately Form the Basis of an Automatically Enacted Federal Spending Law.*

As shown, under this Act statutes are re-written by non-legislators. A vital part of exercising the essentials of legislative power when broad power is delegated is that Congress fulfill its responsibilities by providing adequate standards to confine the discretion vested in the Act's administrators. As this Court has instructed—in a statement that underscores the delegation doctrine's key principle of ensuri[illegible]; accountability in decisionmaking—the critical inquiry is whether there is a standard that "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus*, 321 U.S. at 425. Though the district court failed to heed its own observation, it correctly stated that where the scope of the delegated power grows broad, the standards governing it "must be correspondingly more precise" (J.A. 45) if the delegation is to be meaningfully confined. We believe that the Act's delegation is fatally defective because it gives its administrators unbridled discretion in making the pivotal budget deficit projections which ultimately form the bases of an automatically enacted appropriations law for the entire federal government.

a. The unharnessed authority that the Act confers on the administrators is revealed by a few salient facts. The Act's "automatic" budget cuts take place upon the administrative prediction that a deficit exceeding the target amount by more than 10 billion dollars will occur.[19] Although the administrators are given instructions on how to estimate spending levels where appropriations have not yet been made (more fully described *infra* at 24-25), they are given no instructions as to how to determine the key economic conditions that form the bases of any budget deficit estimate. The delegation flaw in this scheme rests in the entirely open-ended discretion of the administrators to determine the projected deficit. This determination is pivotal, for it ultimately dictates whether and in what amount spending must be reduced to achieve the deficit target. Yet, one searches in vain for *any* statutory guidance regarding the making of these projections. Indeed, the Act fails even to tell *what* determinations are required to arrive at the deficit estimates much less prescribe *how* those determinations are to be made.

Thus, estimating the federal government's future revenues and outlays is left entirely in the administrators'

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[19] The Directors of OMB and CBO are instructed to estimate the "budget base levels of total revenues and budget outlays" for the upcoming fiscal year. Sec. 251(a)(2); J.A. 108-110. The projected deficit is then computed by figuring "the amount by which total budget outlays for such fiscal year exceed total revenues" for that year. Sections 257(4), 201(a)(1); J.A. 161, 103-104. If the estimated deficit exceeds the target by 10 billion dollars or more, the Directors must identify spending reductions as specified by the Act. Sections 251(a)(3), 255, 256 and 257; J.A. 110, 114, 143-161. The Directors then jointly report their conclusions to the Comptroller General who "with due regard for the data, assumptions and methodologies" used by the Directors issues his own report making the same kind of estimates and determinations found in the Directors' report. In the absence of appropriations legislation meeting the deficit targets, the President ultimately must issue an order making the spending cuts specified in the Comptroller General's report. Sec. 252(b)(1)-(3); J.A. 116-122.

discretion. Those estimates are, as suggested, totally dependent upon assumptions about general economic conditions. Among the economic variables affecting government spending and revenues are interest rates (which affect, among other things, payment on the national debt), inflation, the unemployment rate (which influences both the amount of income tax collected and the amount of unemployment compensation paid), the international trade deficit, the strength of the dollar, the gross national product, and the price of oil. Obviously, any computation that must consider all of these variables—assumptions about which experts routinely disagree—is virtually sheer speculation. No matter how fully informed the experts are, unpredictable events occur which affect the deficit. Thus, even when experts agree, they may all be wrong if the price of oil rises dramatically or international conflict breaks out.

The highly conjectural nature of economic forecasting and its direct effect on the budget estimates required by the Act were frankly described by Dr. Rudolph Penner, Director of CBO, during hearings on Gramm-Rudman:

> Given the record of economists, it will not be difficult to convince anyone that economic forecasting is a very uncertain art. Reasonable men and women can differ widely about what the future holds, and even if there is agreement on an economic forecast, there is an added layer of uncertainty involved in translating that forecast into an estimate of budget totals . . . .

Hearings on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Govt. Operations, 99th Cong., 1st Sess., 156-157 (1985). Underscoring that the problem was not forecasting itself, but giving the forecasts automatic effect, Dr. Penner stated:

> It is hard to think of other instances where unelected officials have such power to do good or evil . . . I think the really basic problem is one of linking budgetary policies that should be determined by

> elected representatives to the inherently uncertain forecasts of technicians.

Ibid.[20]

In sum, as the district court stated, the standard guiding delegated power must grow correspondingly more precise as the scope of delegated authority increases; therefore, this delegation to estimate the federal deficit, which lies at the heart of the automatic reduction mechanism, is plainly inadequately guided. The nature of its impact could hardly be more far-reaching; it serves as the base determination on which the amount of across-the-board federal spending for a particular year is calculated and becomes law through the automatic mechanism. Yet the Act gives the administrators free rein essentially to make whatever kind of assumptions they wish in estimating the deficit. In predicting the deficit, the administrators are in fact deciding whether automatic cuts will take place and in what degree. How such a delegation can be viewed as "canalized within banks that keep it from overflowing," *A.L.A. Schechter*, 295 U.S. at 551 (Cardozo, J., concurring), is hard to fathom.

b. The district court identified three reasons to support its conclusion that the Act contained "constitutionally adequate legislated standards." J.A. 48. First, it observed that the Act specifies the assumptions to be made by the administrators in computing the budget base. However, as noted above, these directions provide guidance only to cover areas where Congress has not yet

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[20] Senator Moynihan, an opponent of the Act, described the tying of budget making to economic forecasting as "mad scientism" which the Act makes "the engine of fiscal policy." 131 Cong. Rec. S14906-07 (Nov. 6, 1985). He observed that "[t]his entire machine for deficit reduction rests on our ability to forecast increases or decreases in the gross national product and the deficit. And that we cannot do with any semblance of confidence." *Id.* at S14905. He referred to Dr. Penner's testimony that "any forecast of GNP a year ahead that is off by no more than 1 percentage point [is] an excellent forecast," but appropriately noted that when growth is projected at 4 percentage points, "an error of 1 percentage point is obviously sizable." *Ibid.*

acted on appropriations measures for the coming year. For example, they are directed to assume "the continuation of current law in the case of revenues and spending authority." Section 251(a)(6)(A); J.A. 115-116. They are to assume "appropriations equal to the prior year's appropriations . . . ," except where an annual appropriation or continuing resolution appropriation has already been enacted. Section 251(a)(6)(B); J.A. 116. In addition, they must assume that expiring revenue and spending laws will expire. Section 251(a)(6)(C); J.A. 116.

But these assumptions are the easy ones; they comprise only a few of the many that the administrators must make in estimating the base levels of outlays and revenues. The court below simply ignored that critical assumptions about economic variables must also be made, and, as to these determinations, the Act furnishes no guidance or limitation.

The district court also maintained that the Act confined administrative discretion by defining such terms as "budget outlays," "budget authority" and "deficit." J.A. 49. But again these definitions fail to instruct the administrators even generally as to what they should do in factoring economic conditions into their budget predictions.[21]

Finally, the court asserted that the required assumptions and definitions were guided by "years of administrative and congressional experience in making similar

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[21] Among the guiding definitions cited by the district court was that for "real economic growth." J.A. 49. But this definition does not help cure the defect of which we complain because it does not apply to the administrators' estimates of budget deficits. The Act requires a forecast of real economic growth for a separate reason: to forewarn Congress of any coming recession, in which event special provisions of the Act come into play. *See* Sections 251(a)(1)(C), 254(a), 257(6); J.A. 109, 134-139 and 161 respectively. To the extent real economic growth is considered in calculating the deficit estimates, that projection is obviously only one of many the administrators must assess; as to those other variables the Act gives no guidance.

economic projections and calculations . . ." J.A. 50. To be sure, the cases do suggest that the court may look to historical context and the "common lore" (*Amalgamated Meat Cutters*, 337 F.Supp. at 748) as evidence that Congress has established the bounds within which the Act's administrators must stay. The problem with applying such an approach here is that the "common lore" only underscores the absence of any meaningful norms that confine the administrators' budget forecasting. On the contrary, the district court's claim that "the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations" (J.A. 50) is belied by the almost universal recognition that forecasting involves complex calculations about which even the experts sharply disagree.[22]

c. Finally, the court below viewed the Act as nothing more than "contingent legislation" (J.A. 46), no different from other statutory schemes approved by this Court in such cases as *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382 (1812); *Field* v. *Clark*, *supra*; *United States* v. *Rock Royal Co-operative*, 307

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[22] The folly—and abdication of congressional responsibility—of tying federal spending levels to economic forecasts is underscored by economists' characterizations of such prognostications. Emile van Lennep, who served as head of the Organization for Economic Cooperation and Development, observed that: "Economic forecasting is necessary, but it cannot and should not be used as a reliable guide for economic policies." *When Economic Forecasters Miss the Target*, U.S. News & World Report 80 (Nov. 12, 1984). Harvard economics Prof. Dale Jorgenson has remarked, "I wish I could say economists are powerful thinkers and can tell what's going to happen . . . But they haven't the slightest idea and never had." *What Good Are Economists?*, Newsweek 61 (Feb. 4, 1985). Martin Feldstein, another Harvard economist has said: "One of the great mistakes of the past 30 years of economic policy has been an excessive belief in the ability to forecast." *The Forecasters Flunk*, Time 42 (Aug. 27, 1984). Finally, President Reagan commented not long ago: "Those [economic] projections, frankly, I pay no attention to them." *What Good Are Economists?*, *supra* at 60.

U.S. 533 (1939), and *Currin* v. *Wallace*, 306 U.S. 1 (1939). The district court asserted that Congress has simply provided that the "full effectiveness of all appropriations legislation" will be contingent upon the administrative determination that the legislation has met the specified budget deficit targets. J.A. 46. The court urged that the delegated authority "does not differ in kind from that approved in prior cases." *Ibid.* We disagree.

The material difference between the typical "contingency" statute and this one is found in the nature of the contingencies themselves. Generally, the power to ascertain whether a contingency has occurred has been delegated to administrators. The delegate typically reviews past events and decides whether the condition Congress specified has occurred. In this case, however, the administrators have the sole power to predict what future conditions will be, and their predictions automatically determine what the law will be. In other words, the delegate is deciding whether the contingency *will* occur, not determining ascertainable facts.[23]

For example, in *The Brig Aurora* the Court examined whether a statute gave the President too much discretion in authorizing him to lift a trade embargo against Britain and France if he found that both had ceased violating "the neutral commerce of the United States." 11 U.S. (7 Cranch) at 383-84, 86. The Court concluded that it did not, because the power delegated was confined to fact-finding and involved only a limited exercise of discre-

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[23] Similarly, and contrary to the district court, we believe the Act differs materially from statutes containing provisions contingent, for example, on the consumer price index (CPI). The scope of the power delegated in such statutes is clearly more confined because it involves what are essentially adjustments to spending decisions legislatively made. Determination of the CPI is basically a fact-finding exercise which involves a measurement of past economic conditions pursuant to a formula that is at least well established. Such calculations simply cannot be fairly equated with the making of unguided, highly speculative projections—involving assumptions upon which few can agree—that then serve as the foundation for a government-wide spending policy.

tion. Similarly, in *Field* v. *Clark*, Congress authorized the President to raise tariffs and suspend trade with a foreign nation if he determined that a duty imposed by that country on American goods was "reciprocally unequal and unreasonable." 143 U.S. at 693. Again, the Court upheld the delegation, stating that it could not be said that "when the President ascertained the existence of a particular fact . . . he exercised the function of making laws." *Id.* at 693. These cases involve statutory delegations clearly different from that made by this Act. First, in the "contingent legislation" cases, Congress enacted a law, and instructed the President to determine when particular provisions of that law should take effect. Gramm-Rudman, however, is unique: it allows administrators effectively to supplant other duly enacted statutes and, indeed, it has a continuing effect on future appropriations laws by ultimately making them subject to administrative determinations. In addition, the nature of the executive determinations in those cases related to past events, not, as here, to predicting future events. By pegging operation of those laws to "ascertainable" facts or concrete events, Congress had adequately confined the exercise of the delegated discretion.[24]

Because the administrators of this Act are required to predict a highly complex, future contingency, the result is necessarily extremely speculative. The tying of automatic, substitute legislation to such speculation can hardly be justified on the basis of "fact finding" cases.

3. *The Rationale of "Governmental Necessity" Cannot Justify the Act's Delegation.*

In examining broad delegations, this Court has often considered whether they have been "born of the necessi-

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[24] The Court's decisions in *Currin* v. *Wallace*, 306 U.S. 1 (1939) and *United States* v. *Rock Royal Co-operative*, 307 U.S. 533 (1939) likewise concern executive fact-finding of a relatively limited nature, rather than prediction of future events. In the former, the fact to be determined was the result of a referendum; in the latter, a finding that a price adjustment was needed to sustain farmers' purchasing power at a level equivalent to their purchasing power during a statutorily prescribed base period.

ties of the occasion." *A.L.A. Schechter*, 295 U.S. at 552 (Cardozo, J., concurring). Considerations of flexibility and practicality have been cited as justifying delegations, particularly where the matter legislated is "sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert . . ." *Industrial Union Dept.* v. *API*, 448 U.S. at 675 (Rehnquist, J., concurring).

Indeed, the so-called principle of governmental necessity played an important role in the upholding of two statutes making extremely broad delegations. In *Yakus* v. *United States*, *supra*, the Court sustained a delegation giving an administrator broad power "to promulgate regulations fixing prices of commodities." 321 U.S. at 420. In upholding this war time measure, the Court declared that the Constitution "does not demand the impossible or the impracticable." *Id.* at 424. Similarly, in *Amalgamated Meat Cutters*, *supra*, a three-judge district court upheld a delegation to the President to set wage and price controls and cited, among other reasons, "the practicalities and necessities of the public interest." 337 F. Supp. at 752.

This case presents, however, a situation materially different from those in *Yakus* and *Amalgamated Meatcutters* and, indeed, from any other case, because the delegation here was not made out of "necessity" as that term has been previously used. The power granted to the administrators under the Act—that is, the power to set spending levels—was not ceded because what was required was too technical, complex, or time consuming for Congress to accomplish. Indeed, Congress in the past has managed to make these very budget decisions every year and, under the Act, will at least continue to go through the motions of passing appropriations measures in the future. Stated plainly, the necessity that impelled the delegation made by this Act was, as our earlier discussion of the debates established, the desire to avoid accountability for the divisive spending reductions which

Congress has perceived are required, but the nature of which Congress could not bring itself to specify.

It is this congressional effort to evade responsibility that makes the Act constitutionally unacceptable. As Senator Byrd put it, the "Founding Fathers never envisioned a government bound by a formula, and yet that is exactly what [the Act] would impose on the country." 131 Cong. Rec. S17442 (Dec. 11, 1985).[25]

If an Act so conceived is allowed to stand, the delegation doctrine's underlying objective—namely, to ensure that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"—will be rendered meaningless.[26] Congress would then be able to shield itself—for the first time with the blessing of this Court—from accountability through the "necessity" of political expediency.[27] Such a result would be flatly at odds with the Court's recent teaching in *Chadha* that the fact that a given "procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . ." 462 U.S. at 944.

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[25] *See, e.g., The Federalist*, No. 51 at 322 (J. Madison) (McLean, ed., New American Library, 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and *in the next place oblige it to controul itself.*" (Emphasis added.))

[26] *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 685.

[27] *See* J. Ely, *Democracy and Distrust, supra*, at 137: "That legislators often find it convenient to escape accountability is precisely the reason *for* a nondelegation doctrine. Were it to turn out that legislators forced to govern wouldn't have the courage to do so energetically, that would often be too bad . . . but at least it would be our system."

4. *The Unchecked Nature of the Discretion Vested in the Act's Administrators Is Underscored by the Preclusion of Judicial Review of the Crucial Budget Projections that Determine the Magnitude of Required Reductions in Federal Spending.*

The availability of judicial review has long been viewed as a principal safeguard against overbroad delegations of legislative power. As this Court stated in *Yakus*, such review plays a critical role in ascertaining "whether the will of Congress has been obeyed" and ensuring that a statute's administrator acts "in compliance with the legislative will." 321 U.S. at 425. The importance of judicial review as a means of keeping a delegation within proper bounds was emphasized recently in *Chadha* where the Court observed that a delegation "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded, it is open to judicial review . . ." 462 U.S. 953-954, n.16. Indeed, in the three cases cited by the district court as examples of the upholding of delegations similar to the Act in their breadth (J.A. 45), the availability of judicial review was a critical element in sustaining the statutes under challenge. See *Yakus* v. *United States*, 321 U.S. at 425; *Bowles* v. *Willingham*, 321 U.S. 503, 515-516 (1944); and *Amalgamated Meat Cutters*, 337 F.Supp. at 746, 755, 757, 759. In short, the cases demonstrate that the opportunity for judicial review of administrative action, while not an absolute litmus test, is at least a highly significant factor in measuring whether a particular delegation is sufficiently checked.

Here, in sharp contrast to other cases involving similar sweeping delegations, the pivotal determinations that trigger the operation of the automatic spending reduction mechanism are entirely insulated from judicial review. Specifically, section 274(h) of the Act provides that the Comptroller General's calculation of "the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." J.A. 166. Hence it is clear that the discre-

tion vested in the Act's administrators as to the key budget projection determinations is completely unbridled. It is checked neither by any legislative standards nor by scrutiny from the courts.[28]

We are not contending, however, contrary to the district court's suggestion, that judicial review of the administrators' determinations could save this delegation. J.A. 53. We recognize that the kinds of complex, technical forecasting determinations involved in budget deficit projections are singularly unsuited for court review. Clearly, the courts are inherently incapable of assessing the validity of estimates involving, for example, the impact of inflation or interest rates on future government expenditures or revenues.

The absence of judicial review is nonetheless relevant because it further underscores just how uncontrolled the administrators are in their power to establish the range of federal spending by dictating the amounts of budget cuts that must occur. Stated another way, what follows from the impracticability of judicial review of the key budget projections is not that Congress can therefore give a blank check to the Act's administrators to make federal spending determinations. What follows is that meaningful accountability in the budget setting process can only come from direct congressional involvement in the complex and policy-laden budget determinations that are finally adopted as law.

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The foregoing demonstrates that if accountability of elected officials is to have any meaning in the context of the delegation doctrine, then this Act cannot stand. We have seen, through the words of the Act's own architects,

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[28] As the district court correctly observed, the Act does permit review of certain specified actions of its administrators. J.A. 52. *See, e.g.*, Section 274(d) (J.A. 164) (allowing review of sequestration orders to ensure their compliance with statutory requirements). But the fact remains that the key determinations which ultimately define the contours of budget reductions are immune from judicial oversight.

that Gramm-Rudman was specifically designed, unlike any other statute reviewed by this Court for delegation defects, to overcome political paralysis and allow achievement of a balanced budget through an anonymous no-fault administrative trigger. We have shown that, in the assignment of the far-reaching task of determining federal spending levels, the ties that bind the Act's administrators to our elected representatives are barely discernible and, indeed, non-existent with respect to the making of the pivotal budget forecasts. And, we have demonstrated that unlike other cases that have sanctioned broad delegations, the key administrative determinations are to go unchecked not only by Congress but by the judiciary as well. We think it clear that if this congressional surrender of responsibility is sustained "the line which separates legislative power to make laws, from administrative authority" to enforce them (*United States* v. *Grimaud*, 220 U.S. 506, 517 (1911)) will not only remain restraint of definition, but will, once and for all, have evaporated.

II. THE ACT VIOLATES THE SEPARATION OF POWERS PRINCIPLE BY DELEGATING TO THE COMPTROLLER GENERAL, AN OFFICIAL REMOVABLE BY CONGRESS, A SIGNIFICANT ROLE IN THE ADMINISTRATION OF THE ACT.

The court below held that, because he is removable by Congress, the Comptroller General may not wield the executive power assigned him by the Act, without transgressing the separation of powers. J.A. 61. Congress has retained ultimate power over the Comptroller General, and thereby ultimate control in the administration of this law. Because Congress cannot both make and execute the law, the Act's automatic deficit reduction provisions are unconstitutional.

In analyzing the Comptroller General's powers under the Act, the court below stated that he is to exercise "substantial judgment concerning present and future facts that affect the application of the law," and, to a degree, to decide how the law applies to various govern-

ment programs. J.A. 72-73. The court characterized these as "executive powers in the constitutional sense." J.A. 73. In Point I above, we have argued that, insofar as the Comptroller General actually determines whether broad-based budget reductions will occur at all, and by what percentage, he is exercising the essentials of the lawmaking function. However, if he is not making law, then, at the very least, he has a very significant role in administering and implementing the law.[29] In coordination with CBO, whose role presents an overlapping problem of shared administration of the law,[30] the Comptroller General must make every meaningful final decision under the Act, beyond those already made by the legislature. That being the case, he is unquestionably exercising executive duties.

As appellants acknowledge, these duties, however they are characterized,[31] were assigned to the Comptroller

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[29] Upon receiving the OMB/CBO report, the Comptroller General specifies the levels of anticipated revenue and spending that dictate the gross amount required to be sequestered. As we demonstrated in Point I, his projections concerning the budget deficit and the resulting sequestration depend heavily upon his analysis of the state of the economy. After specifying the gross amount to be sequestered, he must then determine the particular budget outlays in each financial account that are to be reduced and in what amounts. Finally, he is required to submit a revised report, updating his earlier conclusions. The Comptroller General's findings are binding upon the President, leaving him no room for discretion in his execution of the law. Moreover, Section 253 of the Act requires the Comptroller General to report to Congress on the extent to which the President has complied with his order.

[30] We agree with the Congressional appellees that the role of CBO makes the Comptroller General even more vulnerable to congressional interference with his duties under the Act, since the Director is removable by resolution of either House, *see* 2 U.S.C. 601(a)(4) (1982). In addition, we agree, for the reasons stated in the Synar Brief, Argument II, that the participation of CBO represents an independent breach of the separation of powers doctrine.

[31] Appellants characterize these duties variously as "administrative duties" (Sen. Br. at 18), "functions" or "traditional functions" (House Br. at 11-13), and "administrative functions" (CG Br. at 15, 42-47), studiously avoiding the description "executive." The

General in large part out of substantial fear that they could not constitutionally be assigned to the Congressional Budget Office, an undoubted creature of Congress. *See* Sen. Br. at 40; CG Br. at 39. But the court below accurately saw that the Comptroller General, too, owes his ultimate loyalty to Congress, and that therefore he cannot administer the law, any more than the CBO could have.

We shall show that separation of powers principles are indeed violated in this Act, that the Comptroller General is as a matter of fact and law beholden to Congress, and that the court below properly struck down the 1985 grant of power rather than the congressional removal provision of the 1921 statute.

A. Separation of Powers Principles Dictate That Congress May Not Both Make and Execute the Law.

The guiding principles of the doctrine of separation of powers are easy to recite, if sometimes difficult to apply. We know that it is an "archaic view" of the doctrine to require "three airtight departments of government," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977), and that "hermetic sealing off" of the branches "would preclude the establishment of a Nation capable of governing itself effectively." *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976).

It is also clear that there is a need for "limiting principles" in permitting the crossing of the boundaries between branches of government. *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982). It is not the occasional blending of powers, representing the "pragmatic, flexible approach of Madison," *Nixon* v. *Administrator of General Services*, 433 U.S. at 443, with

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Comptroller General would trivialize these functions by describing them as mere "factfinding functions" which are "far more circumscribed than functions assigned to other independent agencies." Br. at 43, n.125. In view of the substantial judgment and discretion required, as well as the sweeping impact of these decisions, it is surely inappropriate to view them as mere chores.

which we are here concerned. Rather, it is the retention by Congress of control over virtually the entire administration of the Act that breaches the principles.

The separation of powers principles are designed to ensure that "the carefully defined limits on the power of each Branch must not be eroded." *INS* v. *Chadha*, 462 U.S. 919, 958 (1983). The legislative veto device outlawed in *Chadha* was of course such an erosion, the fundamental problem of which "is that it represents an attempt by Congress to retain direct control over delegated adminstrative power." *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 476 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983). J.A. 77-78. The same vice exists in the automatic deficit reduction provisions of this Act. If the President's power to execute the laws "refutes the idea that he is to be a lawmaker," then Congress' lawmaking power refutes the idea that it may also execute the laws. *See Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579, 587 (1952).

In this Act, Congress' ultimate control over the Comptroller General and the CBO gives Congress continuing and pervasive influence in the Act's administration—precisely what the separation of powers forbids.[32]

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[32] The Third Circuit recently held in *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, Nos. 85-5226 and 85-5377 (March 27, 1986), that the Comptroller General could constitutionally perform the executive duties assigned him by the Competition in Contracting Act (CICA), 31 U.S.C. 3551-3556 (1984), notwithstanding that he is removable by Congress. The Comptroller General's role under CICA is to review government contract bid protests, the filing of which automatically stay the contract. Slip op. at 6-7. The Comptroller General's role is largely advisory, and, unlike his role under Gramm-Rudman, he has "no ultimate veto over government appropriations." *Id.* at 25. The Comptroller General's power under Gramm-Rudman is manifestly different. First, it is of a vastly greater magnitude, in that it involves considerable unreviewable discretion and affects virtually all federal programs and therefore all citizens. Second, it is of a different quality, in that under this Act, the Comptroller General exercises a power, unlike the ruling on individual bid protests, over which Congress has keen and abiding

B. The Comptroller General Is Beholden to Congress by Virtue of the Congressional Removal Power and of His Complete Independence from the President.

Although the President appoints the Comptroller General from among nominees supplied by Congress, it is Congress alone that has the absolute power of removal, accomplished by joint resolution, either with the President's concurrence or over his veto. 31 U.S.C. 703(a) and 703(e)(1)(B). He may be removed for any one of five reasons, including the open-ended "neglect of duty" and "inefficiency." *Ibid.*

The court below stated that the "here-and-now subservience" to Congress created by the Comptroller General's "presumed desire to avoid removal by pleasing Congress" creates the separation of powers problem. J.A. 57. Appellants all dispute this notion, taking particular umbrage at the word "subservience." CG Br. at 22-27; Sen. Br. at 18-20; House Br. at 31-33. But it is a matter of common sense that one looks for guidance and instruction to the power that keeps one in office. *Northern Pipeline*, 458 U.S. at 59-60.[33] Here, that power belongs to Congress, and, as we shall see, the President

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interest. The power it has retained over the decisionmaking, by assigning the determinative roles to the Comptroller General and CBO, enables Congress to exercise dominion over the Act's administration, in violation of the separation of powers. For the reasons stated herein, we believe the Third Circuit simply did not appreciate the Comptroller General's dependence on Congress. But in any event, his roles under CICA and Gramm-Rudman are not comparable in kind and in quality.

[33] Appellants are in error in contending that because removal of a Comptroller General has not yet been attempted, the effect of the removability upon his powers is not yet ripe for adjudication. Sen. Br. 25-31. The court below easily disposed of this argument by relying on *Northern Pipeline*, 458 U.S. 50, in which the impact of the bankruptcy judges' unconstitutional tenure came from their dependence on the President's power to reappoint. The constitutional vice here, said the court, was "exercised" in the same way: it creates an impermissible subservience, here to Congress. J.A. 57.

possesses no part of that power, or any other power, over the Comptroller General.

Appellants all make a critical error. They take pains to demonstrate the "independence" of the Comptroller General, so as to show that he is not subservient to Congress. *See* CG Br. at 24-27; Sen. Br. at 18-20; House Br. at 20-24. But they do so by emphasizing Congress' unquestioned intent to guarantee his independence from the President. During the 1921 congressional debates, for example, where this office was born, the point of contention, as described in the Comptroller General's brief, "was whether and how Congress could protect the new officer from removal at the pleasure of the President." Br. at 24. The whole purpose, it said, was "to make him independent, and therefore he had to be free from the threat of discretionary removal by the President." *Ibid.* Even the frequent congressional and judicial references (*see* J.A. 71, n. 29) to the Comptroller General as an "arm" or "agent" of Congress [34] do not suggest, in appellants' view, subservience to Congress, but merely "protection against discretionary removal by the President." *Id.* at 26; Sen. Br. at 20, n. 23.

The demonstrable fallacy is in assuming that the greatest separation from the President gives greatest independence from Congress also.[35] On the contrary, between two coordinate branches of government, the greatest independence is at the mid-point. The con-

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[34] *See, e.g., Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983); *McDonnell Douglas Corp.* v. *United States*, 754 F.2d 365, 368 (Fed. Cir. 1985); *United States* v. *McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984); *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984). *See also*, the numerous statutory powers and duties embodying the "special relationship" between Congress and the Comptroller General listed by the court below at J.A. 71, n.29; and 2 U.S.C. 703(b) and 41 U.S.C. 601, *et seq.*, listing GAO as in the legislative branch.

[35] The Comptroller General's brief even suggests that his status as "arm of Congress" is merely a "synonym" for independence. CG Br. at 27.

tinuum stretches from total dependence on the President at one end (removal at will) to total dependence on Congress at the other end (removal by Congress at will), with the position of greatest independence mid-way between, where careful balance exists in the power and influence of both branches. The court below properly saw the position of the Comptroller General as near the congressional dependence end of the scale.

We have no reason to doubt the genuineness of the Congressional intent to keep the Comptroller General "independent." It is obvious that many of his significant duties, such as the auditing of, and preventing illegal impoundments by, executive agencies require complete independence from the President. The critical fact for purposes of this case is that Congress did not itself relinquish control. It clearly made the judgment that the best way to guarantee the necessary independence *from the President* was to reserve to itself the power to direct the Comptroller General, to control his budget, and to remove him from office. The court below was quite correct to view that reservation of power as creating "subservience."

Thus, as the court below noted, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." J.A. 75. Indeed, control over an official's tenure in office has a greater effect over the independence of those officials than any other factor, with the obvious exception of one's compensation. *Northern Pipeline*, 458 U.S. at 60, *quoting* Alexander Hamilton, *The Federalist*, No. 79, p. 472 (McLean ed., New American Library 1961).[36]

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[36] Appellants argue that appointment in conformity with the Appointments Clause enables the Comptroller General to exercise executive power assigned him by the Act. Sen. Br. at 14-17. But proper appointment is merely a necessary prerequisite to the wielding of significant executive powers; it does not follow that all officers so appointed may exercise such powers. Nor does *Buckley* v. *Valeo*, heavily relied on by appellants, say otherwise. There, the

The House brief, in particular, argues that the ruling of the court below would prevent "independent agencies" from performing functions they have "traditionally" performed. House Br. at 10-14. But the court below did not speak to the question of what independent agencies can do. It held that the Comptroller General may not be regarded as "independent," in the same sense as the Federal Trade Commissioner was in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). The House brief simply begs the question of the Comptroller General's independence.[37]

In establishing control over the Comptroller General's tenure, Congress has taken a giant step beyond its role approved in *Humphrey's Executor*. Instead of limiting the President's removal power, as it had done there, Congress kept for itself the power to remove the Comptroller General. The President cannot initiate removal; he cannot even prevent it if there is the support in Congress to override his veto.

Furthermore, the President has no other power which would offset Congress' absolute removal power. Although he appoints the Comptroller General, he selects from among nominees sent to him by Congress, making it extremely unlikely that he would wish to defend the Comptroller General, should Congress wish to remove him. He does not give instructions to the Comptroller General. And because the Comptroller General serves for a non-

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Court merely observed that the Comptroller General cleared the initial appointment hurdle, without exploring whether this fact alone enabled him to perform significant executive powers comparable to those authorized under this Act. *Buckley*, 424 U.S. at 128, n.165.

[37] The Comptroller General's brief similarly begs the question by arguing that the district court's ruling implicitly prohibits an "independent" officer from performing the functions at issue, but that instead the officer must be removable by the President at will. Br. at 12, 42 n.125. Of course, the district court explicitly declined to so hold. J.A. 60. It merely held that the Comptroller General is not sufficiently independent of Congress to exercise the powers assigned him under the Act.

renewable term, the President cannot even use his power to re-appoint as a counterweight to the congressional removal power. *See Northern Pipeline*, 458 U.S. at 58.

In sum, the cumulative effect of Congress' ultimate control over the tenure of the Comptroller General and the absence of any control by the President over his tenure or his duties transgresses the principle "that makes one master in his own house [and] precludes him from imposing his control in the house of another who is master there." *Humphrey's Executor*, 295 U.S. at 630. There is no independence in this imbalance.[38]

The fact that there has been no attempt to exercise the power to remove the Comptroller General does not suggest, as appellants would have it, that the power is vestigial. CG Br. at 31-33; Sen. Br. at 29-31. Its usefulness as an effective tool to guarantee allegiance does not require that it actually be exercised. It is not the act of removal, but the everpresent prospect that is of moment here. As the Comptroller General's brief notes (at 30, n.90), there are numerous instances in which officials resigned under a threat that charges would be brought against them. Thus, for most high government officials, the mere threat that public charges would be filed, alleging inefficiency, neglect of duties, or worse, is enough to cause them to step aside.[39]

It is simply illogical to contend that the Comptroller General does not take cognizance of Congress' direct power over his tenure, and behave accordingly. Indeed, it is even possible that the fact that removal has never been attempted is a testament to the effectiveness of the

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[38] Consequently, the Comptroller General is mistaken when he attempts to analogize his duties under the Act to the administrative role of the Board of Governors of the Federal Reserve System. Since Board members, unlike the Comptroller General, are removable by the President, albeit for cause, as are other independent agency heads, no separation of powers problem is presented.

[39] The unexercised legislative veto carries much the same threat, as noted by former Congressman, Judge MacKinnon, in dissent in *Clark* v. *Valeo*, 559 F.2d 642, 680-82 (D.C. Cir. 1977), *aff'd sub nom. Clark* v. *Kinnett*, 431 U.S. 950 (1977).

mere existence of the power as a device to ensure the Comptroller General's loyalty.

Finally, appellants argue that Congress' power to remove for cause is no more coercive than the similar presidential power approved by this Court in *Humphrey's Executor*, 295 U.S. 602, or the Senate's power to refuse to confirm a presidential appointment. CG Br. at 11, 27-30, 43. The argument, however, fails to recognize that the separation and balance between the branches are preserved in those situations, whereas they are violated here.

In *Humphrey's Executor*, there was no constitutional requirement of independence from the President. On the contrary, after *Myers* v. *United States*, it was thought that the President's power to remove, as incident to his constitutional power to appoint, was illimitable. 272 U.S. 52, 161 (1926); *In re Hennen*, 38 U.S (13 Pet.) 230, 259 (1839). The question was whether Congress, wishing to ensure independence from the President, could constitutionally limit that otherwise illimitable power. The Court had no occasion to consider whether presidential removal power might be too "coercive"; rather, it merely accepted the premise that Congress may set the terms for removal to provide some security to the Federal Trade Commissioner.[40]

The independence desired for the Commissioner was thus embodied in the statute, not required by the Constitution. The independence Congress sought was preserved by permitting *both* branches a role in the Commissioner's tenure. In contrast, here, as we have shown, the balance between branches is entirely upset by Congress' reservation of sole power over the Comptroller General's tenure.

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[40] The court below noted that, whatever restrictions may be placed on the President's power to remove, that power derives from the constitutional power to appoint. Any greater impact upon an officer's independence from the President's power, as compared with the Congress' power, "may properly reflect the greater strength of that pedigree." J.A. 76-77.

Balance between the two branches is similarly evident in the Senate's constitutional power to refuse to confirm a presidential reappointment, a lesser intrusion in any event than for Congress to take a direct role in removal.[41] Both branches play a role in the officer's tenure, and a measure of independence for the officer is preserved. But over the Comptroller General, the President has no balancing influence whatever.

In sum, the distinction between merely imposing restrictions on another party's power to remove and reserving that authority to oneself is plain. It is the total usurpation by Congress of the power over the Comptroller General's tenure that renders him subservient to Congress and incapable of administering the Act.

C. The Court Below Properly Struck Down the Act's Grant of Powers to the Comptroller General, Rather Than the Removal Provisions of the 1921 Act.

Appellants argue that if the powers granted to the Comptroller General under this Act and Congress' power to remove the Comptroller General cannot constitutionally co-exist, then the Court should choose which statute should fall. CG Br. at 15, 33-38; Sen. Br. at 31-2. In their opinion, congressional intent dictates choosing to invalidate the removal provision.

The court below properly refused to take that path. It regarded as extraordinary a suggestion that a court "even consider[] choosing" which statute to invalidate. J.A. 59. Based on the precedents of this Court, the district court found that the proper route was to set aside the statute embodying the alleged injury-in-fact that gives standing to plaintiffs. *Ibid*; *see Springer* v. *Government of the Philippines*, 277 U.S. 189 (1928); *Myers* v. *United States*, 272 U.S. 52 (1926); *Northern Pipeline*

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[41] *See Myers* v. *United States*, in which a veto by the Senate over presidential removal was said to be "a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment." 272 U.S. at 121.

Construction Co. v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982); and *Buckley* v. *Valeo*, 424 U.S. 1 (1976).[42]

Appellants now offer one case which they say supports choosing between constitutionally incompatible statutes; *Glidden* v. *Zdanock*, 370 U.S. 530 (1962, plurality opinion). CG Br. at 16-17; Sen. Br. at 34-5. In *Glidden*, the Court revisited the question of the Article III status of the Court of Claims and Court of Customs and Patent Appeals. The plurality and concurring opinions agreed that these courts had now become Article III courts. They rejected the argument that the courts' statutory authority to render advisory opinions destroyed the Article III status Congress had so clearly intended to create.

Contrary to appellants' assertion, the Court did not choose between constitutionally incompatible statutes. The plurality struck down neither (though it indicated how it *would* choose if it were necessary, 370 U.S. at 583), because it regarded the incompatible advisory opinion jurisdiction as so insignificant that it did not undermine the status of the Article III courts. Nor did the concurring Justices choose between the two statutes. Rather, they regarded the later statute which conferred Article III status on these courts as effectively voiding the earlier statute authorizing advisory opinions. *Id.* at 587. In other words, Congress had already made the choice. *Glidden* thus does not help appellants here.

Although the court below made it clear that it was inappropriate to consider invalidating the removal provision, it also made clear that, if it were free to choose and if congressional intent were the determinant, the Act's grant of powers would still have to fall. The court

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[42] The Comptroller General merely claims that these cases are irrelevant because "the asserted incompatibility existed within a single statute, not between the statute that the plaintiff[s] attacked and some other statute." CG Br. at 17, n.44. Besides the fact that no explanation is offered as to why a different rule should apply when two statutes, rather than one, are involved (in fact, the rule seems even more appropriate for separate statutes), two of those cases, *Springer* and *Myers*, concerned conflicts between statutes which were constitutionally incompatible with earlier statutes.

regarded it as doubtful that Congress would have chosen to give these powers to an official whom it could not remove. It noted that the House brief established clearly that a principal reason for granting this power to the Comptroller General was to avoid the perceived "pro-executive bias of the OMB." J.A. 60; *see also*, CG Br. at 39. As we have argued, Congress' ability to remove the Comptroller General is a key element of his independence from the President, and Congress regarded it as vital to retain that independence in this statute.

Moreover, to choose to invalidate the removal provision would inevitably alter the Comptroller General's relationship with Congress. It simply makes no sense to argue that it makes no difference to Congress or to the Comptroller General who has power to remove him. Removal by the President (or no removal at all) would unquestionably make him less dependent on Congress in form and in fact. Considering the close functional relationship between them, the many duties he performs of direct service to Congress, and the frequently adversarial relationship with the Executive Branch, described by the court below at J.A. 72-3, n.29, there is no reason to suppose that Congress would want to make such a fundamental change after 65 years of operation under existing assumptions. In addition, as the court below noted, there is no way to assess whether the Comptroller General's many powers would have been conferred on him at all if he were not removable by Congress. J.A. 60-61. Nothing in the legislative history or anywhere else suggests that Congress would tolerate such a change.[43]

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[43] The brief 1920 colloquy heavily relied upon by the appellants hardly "leaves no doubt" (CG Br. at 35) that Congress would have adopted the 1921 Act without the removal provision; to the contrary, it is clear that this isolated exchange carries no weight. The three congressmen involved essentially speculated as to the Act's fate if the Supreme Court found the removal provision invalid. Indeed, one participant, though he seemed to indicate a belief that a Court decision would not nullify the whole Act, admitted that he

There is simply no warrant, as appellants would have it, for assuming that congressional removal is of no consequence. On the contrary, the manner of removal was a bone of considerable contention in the 1921 Act, having been the subject of a veto by President Wilson, who believed the removal power should be his alone. Congress quite clearly went as far as it was prepared to go in agreeing to removal by joint resolution with the concurrence or over the veto of the President. It must be remembered that, even if Congress never expected to exercise the removal power, it did regard it as necessary to retain the power in order to keep it entirely out of the President's hands.

Finally, the existence of the fallback provision in the 1985 Act gives concrete guidance as to the choice between striking the powers or the removal. J.A. 60-61. Under the 1985 Act, we know quite clearly what Congress intended in the event part of the statute falls. We have no such advantage in the 1921 Act. Questions regarding how the Comptroller General could be removed (whether only by impeachment, or by the President, with or without cause), how the relationship between the Comptroller General and Congress would alter, and whether Congress would have wished to grant him the many powers it has if it did not possess the right to remove, can only be answered by speculating as to congressional intent. If the removal provision is to be rewritten, it is a job for Congress.

Neither does casting the question as one of "severability" help the appellants' argument; severability problems arise when a portion of a statute is held unconstitu-

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had not given the question "any consideration." 59 Cong. Rec. 8611 (remarks of Rep. Good) (1920). That Congress ultimately viewed the removal provision as critical is underscored by the fact that the 1921 Act retained such a provision despite President Wilson's veto and various legislative suggestions that the removal power be eliminated. Appellants' reliance on various forms of the statute which did not contain the removal authority, CG Br. at 37-38, is unavailing, since those proposals did not become law.

tional, so that one contemporaneous question of congressional intent exists.[44] The inherently difficult problems of reconstructing hypothetical congressional intent are staggering when two statutes, passed 65 years apart are unconstitutional in combination.

Under the appellants' analysis, the Court would have to decide that the Comptroller General's 1921 auditing and accounting duties were constitutionally incompatible with congressional removal at the outset. It would then have to decide, in the face of considerable evidence to the contrary, that the 1921 Congress would have preferred the Budget and Accounting Act without congressional removal had it known that the entire statute could not stand. Finally, it would have to decide that none of the powers granted the Comptroller General since 1921 (*see, e.g.*, CG Br. at 21-22, n. 55), including the very significant powers granted in the Gramm-Rudman Act, would have made any difference to the 1921 Congress, *and* that the 1985 Congress as well would have chosen to give the same power to an official whom it could not remove.

Apparently undaunted by this task, appellants ask this Court to sever congressional removal from the statute which created the position, in order to preserve duties conferred upon that office some 65 years later. The judicial surgery required by this task is simply too radical to be undertaken safely.

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[44] In *Regan* v. *Time Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3269 (1984), relied on by the Senate, only one statute was involved; the same is true of the other leading severability cases: *Buckley v. Valeo*, 424 U.S. 1 (1976); *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932), and *United States* v. *Jackson*, 390 U.S. 570 (1968).

CONCLUSION

For all the foregoing reasons, the Act's automatic deficit reduction mechanism should be declared unconstitutional.

Respectfully submitted,

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